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IN THE

Supreme Court of the United States

October Term, 1969

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No. 316

DIANA KEARNY POWELL,

Petitioner,

v.

NATIONAL SAVINGS AND TRUST COMPANY,

Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIANA KEARNY POWELL
1500 Massachusetts Avenue, N. W.
Washington, D. C. 20005

Petitioner, pro se

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Diana Kearny Powell respectfully prays for reconsideration of the Order entered the 13th day of October, 1969, denying petition for writ of certiorari in the above-entitled case, and for a request by this Court directed to Respondent for a reply to this Petition for Rehearing, under Rule 58(2) and (3) of the Rules of this Court.

INTERVENING CIRCUMSTANCES AND GROUNDS NOT PREVIOUSLY PRESENTED

Petitioner respectfully represents to the Court that it is the urgent duty of this Court to review and correct the plain error resulting in serious miscarriage of justice.

Intervening circumstances not previously presented are as follows:

Chief Justice Warren E. Burger, newly appointed to the Supreme Court of the United States, did not participate in the action of this Court in denying certiorari. It is assumed his abstention is because of the relation of the instant case to *Powell v. Powell*[1] (*Powell v. National Savings and Trust Company* on appeal), in which case Judge Burger, as a Judge of the United States Court of Appeals for the District of Columbia Circuit, wrote the majority opinion. In that opinion appeared the material and patent error of fact, as well as error in the wording of the will which it interpreted on the basis of the error, and error in the citation of precedents, which this and other related cases seek to correct, on the Constitutional grounds that a judgment predicated upon material error of fact and law that completely frustrates the plain meaning of the will it purports to interpret, as well as refusal to correct the error, deprives Petitioner of basic constitutional rights of due process of law and a fair trial on the merits. *Ochoa v. Hernandez*, 230 U. S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033.

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[1] *Lucy Powell v. Diana Kearny Powell, et al.*, on appeal, *Powell v. Nat. Sav. and Trust Co.*, 111 U. S. App. D. C. 290, 296 F.2d 412, cert. den., 368 U. S. 946, 7 L.Ed. 2d 348, 82 S. Ct. 307 (1961), rehg. den., 368 U. S. 1005, 7 L.Ed. 2d 547, 82 S. Ct. 597 (1962); 114 U. S. App. D. C. 296, 314 F.2d 274 (1963), 379 U. S. 920 (1964), rehg. den., 379 U. S. 984 (1965); 384 U. S. 938, 1027, 86 S. Ct. 1919 (1966), 390 U. S. 957, 1037 (1968).

To the best of Petitioner's knowledge and belief, the Chief Justice has no personal interest in the result of this litigation that he should disqualify himself. On the other hand, Petitioner points out that it should be a matter of grave concern and soul-searching on the part of the Chief Justice that because of errors which he made, which no one else is in a position to correct, and because of his neglect of his judicial duty to be the first to correct (*Scott v. State*, 323 S.W.2d 445, Tex. Ct. App. , *Cannons of Judicial Ethics*, Canon 20), irreparable damage and fraud has been perpetrated, and settled law controlling distribution of remainder estates reduced to a shambles.

The material errors of law and of fact have been defined in detail in related cases, which are incorporated by reference, the files being held in this Court for that purpose.

In the related proceeding, *In the Matter of Diana Kearny Powell,*[2] Judge Burger, as a witness under oath, testified on January 18, 1966, as follows:

> "Miss Powell, I have no recollection of the details of the particular case you are talking to me about. . . . I have not read the opinion in that case since it was written some five, six or seven years ago. I have not looked at the record since that time, . . ." Tr. 37-38.

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[2] *In the Matter of Diana Kearny Powell, Powell v. Committee on Adm. & Grievances,* Misc. 54-65, ___ F.2d ___, ___ U. S. App. D. C. ___, 87 S. Ct. 1487, 386 U. S. 1035, ___ L.Ed. ___, reopened (1967), ___ F.2d ___, ___ U. S. App. D. C. ___, file held in this Court, Oct. Term, 1967, No. 1200; *In the Matter of Diana Kearny Powell,* Disbarment No. 108 U. S. App. D. C., file held in this Court, Oct. Term, 1967, No. 974; in this Court, Misc. 882.

A few pages before this, the transcript (30-31) shows the following:

> "Q. Your Honor, is it not a patent misstatement of the record which was before you in the joint appendix in No. 16,071, when you stated: 'In 1958 the last survivor of five life tenants of the trust estate died?'
>
> "A. I don't have the total record before me, but if we said that in the opinion, I am confident that that is a correct reflection of the record. If it was not, the dissenting opinion would surely have pointed it out. And I do not recall whether the dissenting opinion undertook to deal with it or not; but if it was wrong and if it was relevant, it surely would have been called to our attention.
>
> "Q. Your Honor, isn't it a fact that that was called to your attention and the mistake was completely ignored on numerous occasions?"

The witness was not permitted to answer the question.

The record as it stands reveals that no attempt was made to review and correct the error in response to the continuing efforts of Petitioner to preserve her right to have the case determined on the true law and facts. The errors included such relevant and material facts as the status of Petitioner's father and date of his death, upon which Petitioner's claim as a remainderman substituted under the terms of the will was predicated, the identity of the trustee and the date and circumstances by which the trust was terminated and the title, vested in the trustee, became under the terms of the will the outright present property in the remainderman, and who were vested remaindermen, in being, ready and predetermined under the provisions of the will of testratrix and not

under any other instrument, to take the property at that instant, the termination of the trust. The misstatement of these facts of record and the chain of reasoning in the majority opinion states the claim of Petitioner, predicated solidly upon a completely lucid and unambiguous clause of the will, as though it were a contrivance to evade the distribution under the will. In doing so, the majority opinion frustrated the plainly stated, perfectly clear and completely natural distribution of the remainder stated in the will, to alienate the estate as though the testatrix had died intestate and Petitioner, the only person having a real interest and direct claim both under the terms of the will and under the natural law of descent and distribution, was non-existent and claiming as an alien.

In the above-cited testimony by Judge Burger, in the proceeding on the disbarment of Petitioner, because she addressed to the Attorney General a pleading seeking criminal prosecution of those responsible for the fraud and deception which, if his testimony is to be considered as being given in good faith, did in fact deceive and mislead him, he testified at page 32 of the transcript:

> "THE WITNESS: I believe you are misconstruing my response, Miss Powell. I said if it was relevant and if it was erroneous, it would have been made a point in the dissenting opinion, and I do not see that it was.
>
> There are many statements made in briefs and records which you, as a lawyer, or other lawyers might think important which the Court doesn't consider relevant or important at all."

Since by the Chief Justice's own testimony the record was not once reviewed in response to the successive actions alleging fraud and error, his abstention at this point would result in further protecting those responsible for the fraud and deception, and would raise a serious question as to his own good faith. Petitioner believes that the Chief Justice is acting in good faith, and is unaware that associates of those profiting by his decision and the suppression of the evidence of error and fraud were active in excluding Petitioner from presenting testimony and other evidence at the hearing on his confirmation.

WHEREFORE, Petitioner prays that review of the above-entitled case be granted, and that this Court request Respondent to submit a Reply, and for such other and further relief as to this Court seems proper.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

I, Diana Kearny Powell, the Petitioner herein, hereby certify that the foregoing Petition for Rehearing of Denial of Petition for Writ of Certiorari is presented in good faith and not for delay, and that it is restricted to intervening circumstances of substantial effect, or which to the extent that they were available to petitioner, were not previously presented.

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